

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Ellen Gavin
Marshall Johnson
LeRoy Koppendrayner
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of Northern
States Power Company d/b/a Xcel Energy and
Dairyland Power Cooperative for a Certificate
of Need for a High Voltage Transmission Line

ISSUE DATE: April 8, 2003

DOCKET NO. ET-3, E-002/CN-02-2052

ORDER GRANTING EXEMPTION IN PART
AND REQUIRING SUPPLEMENTARY
FILING AND NOTICE

PROCEDURAL HISTORY

Dairyland Power Cooperative (Dairyland) and Northern States Power Company d/b/a Xcel Energy (NSP) have declared their intent to seek a certificate of need to build a 115 kilovolt (kV) transmission line roughly from North Branch, Minnesota, to Taylors Falls, Minnesota, and a 161 kV line roughly from Taylors Falls to Amery, Wisconsin. The certificate of need process is governed by Minnesota Rules, parts 7849.0010 *et seq.*

On November 26, 2002, Dairyland and NSP (the applicants) petitioned for an exemption from Minnesota Rules part 7849.0270, subparts 2.B. and C. of the certificate of need rules. Commission rules provide a 30-day period to rule on such petitions. Minn. Rules, part 7849.0200, subp. 6.

On December 16, 2002, Laura and John Reinhardt filed a petition to disqualify Commissioners Gavin and Reha from participating in the proceedings. Mark Oberg filed comments on the same subject on December 20.

On December 19, 2002, during a Commission hearing in this docket Commissioners Gavin and Reha recused themselves from this matter.

On December 20-23, 2002, the Commission received additional comments from Concerned River Valley Citizens (CRVC), the City of Lindstrom (Lindstrom), the Minnesota Department of Commerce (the Department), the staff of the Minnesota Environmental Quality Board (the EQB staff), the North American Water Office (NAWO), Mark Oberg, and the Reinhardts.

On December 24, 2002, the Commission issued its ORDER VARYING RULE AND EXTENDING TIME LINE FOR COMMISSION ACTION.

On January 3, 2003, the Commission received comments from Thomas R. Martin, and reply comments from EQB and collectively from the applicants. Additionally, Mr. Oberg submitted articles from the *St. Croix Sentinel*.

On February 12, 2003, the Chisago County Commissioner Lora Walker filed comments.

The matter of the exemption request came before the Commission on February 13, 2003. Having already recused themselves, Commissioners Gavin and Reha took no part in the hearing. Without objection, the Commission accepted Ms. Walker's comments into the record.

FINDINGS AND CONCLUSIONS

I. The Certificate of Need, Applications and Exemptions

To build a large energy facility in Minnesota, a person must first obtain a certificate of need by fulfilling requirements designed to demonstrate that the facility is needed. Minn. Stat. § 216B.243, subd. 2. The term “large energy facility” includes any transmission line with a capacity of 100 kV or more with more than ten miles of its length in Minnesota or that crosses a state line. § 216B.2421, subd. 2(3). Dairyland’s and NSP’s proposed transmission lines would each have a transmission capacity exceeding 100 kV, and one would cross the Minnesota-Wisconsin state line; therefore they qualify as large energy facilities.

Pursuant to § 216B.2421, subd. 1, rules were adopted establishing the requirements for making an application for a certificate of need, as well as the ultimate criteria for demonstrating need, and were codified at Minnesota Rules, parts 7849.0010 *et seq.* The applicants seek an exemption from some of the application requirements. The rules provide for such exemption requests. Minn. Rules part 7849.0200 subp. 6.

II. Recusal

Before becoming commissioners, Ellen Gavin was an attorney with the Minnesota Office of the Attorney General assigned to work with the Minnesota Department of Public Service (now the Department of Commerce), and Phyllis Reha was an administrative law judge with the Office of Administrative Hearings. In these capacities, both Ms. Gavin and Ms. Reha participated in a prior case regarding the routing of a transmission line in this corridor. In the interest of avoiding the appearance of prejudice, on December 19, 2002, both commissioners voluntarily recused themselves from participation in the current docket.

Consequently, the petitions to disqualify these commissioners are now moot.

III. Notice

A. Comments

Mr. Oberg argues that landowners along and adjacent to the route of a proposed transmission line have a right to receive mailed notice of all activity in the current docket, including exemption requests and the Commission's meeting to consider them. Mr. Oberg notes that if NSP eventually receives authority to build the proposed line, NSP would also receive permission to exercise the power of eminent domain to secure the necessary rights-of-way. Since this docket has the potential to affect the rights of land-owners eventually, Mr. Oberg argues that landowners were legally entitled to receive mailed notice when the docket began, and NSP's failure to give this notice represents a continuing violation of the landowners' due process rights.

While no other party espoused Mr. Oberg's legal arguments, Lindstrom, the Reinhardts and Ms. Walker argued that sound public policy favors giving landowners early notice of this proceeding, ideally through the mail. But Lindstrom acknowledged the need to balance early notice with "timely" notice – that is, notice that not merely informed landowners of the project, but also informed them of an opportunity to participate in the proceeding.

The applicants argue that the notice issue is not germane to their exemption request, and propose that it be addressed at a later stage of this proceeding.

B. Commission analysis

As a public agency, the Commission is mindful of its duties to permit members of the public to learn of proceedings before it. For example, the Commission requires anyone filing a document with the Commission to serve a copy (or sometimes a summary) on people on the appropriate service list on the same day. Minn. Rules part 7829.0400, subp. 5. People can place their names on official service lists upon written request. Minn. Rules part 7829.0700, subp. 1. Additionally, a potential intervener who wishes to receive notice of a particular kind of filing can ask to be placed on the utility's general service list. The list would also include people who intervened in the utility's last filing of the same type, or in its last general rate case. Minn. Rules parts 7829.0600; see also Minn. Rules part 7829.2500, subp. 3.

For the benefit of those who have not placed themselves on these service lists, the Commission requires that certain events be publicized. For example, the Commission gives regular notice of its own meetings (Minn. Stat. § 13D.04) by, among other means, publication in its *Weekly Calendar* or on its site on the World Wide Web, <<http://www.puc.state.mn.us>>. Where certificate of need proceedings are concerned, the Commission requires notices to be published in newspapers of general circulation throughout the state (Minn. Rules part 7829.2500, subp. 5) and the *State Register* (Minn. Rules part 7829.2500, subp. 4). And whenever a large energy facility is proposed, the Commission holds one or more public hearings at times and places convenient for the public. Minn. Stat. § 216B.243, subd. 4.

That being said, there is no legal duty to provide direct mailed notice to landowners at this stage of a certificate of need proceeding. Neither the Commission's general rules of practice and procedure for certificates of need (Minn. Rules part 7829.2500) nor its rules for requesting exemptions from application requirements (Minn. Rules part 7849.0200, subp. 6) impose such a duty.

While due process may not compel the applicants to mail notice to landowners at this time, the Commission appreciates the policy argument that public participation can be enhanced through broad and early public notice. As the Reinhardts observe, the Commission embraced this policy recently in publishing its Proposed Permanent Rules Related to Biennial Transmission Projects Reports.¹ These rules would establish, in a similar context,² a minimum standard for who should receive mailed notice and what that notice should contain:

7848.1900 NOTICE PLANS WHEN SEEKING CERTIFICATION.

* * *

Subp. 3. Types of notice. Proposed notice plans must include notice to the following persons by the method specified:

- A. direct mail notice, based on county tax assessment rolls, to landowners reasonably likely to be affected by the proposed transmission line;
- B. direct mail notice to persons in possession of or residing on any property reasonably likely to be affected by the proposed transmission line;
- C. direct mail notice to local and tribal governments whose jurisdictions are reasonably likely to be affected by the proposed transmission line; and
- D. newspaper notice to members of the public in areas reasonably likely to be affected by the proposed transmission line.

Subp. 4. Notice content. Proposed notice plans must provide notice recipients with the following information:

- A. a map showing the end points of the line and existing transmission facilities in the area;
- B. a statement as to whether the utility intends to construct the line on existing right-of-way currently devoted to transmission or intends to acquire property rights for new or expanded right-of-way;
- C. a notice that the line cannot be constructed unless the commission certifies that it is needed;

¹ See 27 SR 1143-1155 (January 21, 2003).

² Minnesota Statutes § 216B.2425 directs certain entities to file reports addressing, among other things, the adequacy of their transmission facilities, their plans to build new facilities, and their efforts to secure public input on these plans. This process can function as a substitute for the certificate of need process since projects approved as part of this filing do not require a certificate of need. The Commission has proposed rules to implement § 216B.2425 including rules establishing minimum standards for soliciting public input. *Id.* at 1152.

- D. the commission's mailing address, telephone number, and Web site;
- E. the address of the Web site on which the utility or utilities proposing the line will post their biennial transmission projects reports;
- F. a statement that the board [Minnesota Environmental Quality Board] will be preparing an environmental assessment of each high-voltage transmission line for which certification is requested;
- G. a brief explanation of how to get on the mailing list for the board's proceeding; and
- H. a statement that requests for certification of high-voltage transmission lines are governed by Minnesota law, including specifically this chapter, chapter 4410, and Minnesota Statutes, section 216B.2425.

The Reinhardtts also observe that giving notice in this case should be relatively simple. At least part of the project consists of upgrading an existing line; consequently, the path of this part of the project is not in serious dispute and the affected landowners are readily identifiable.

While the proposed rules are not designed to govern a certificate of need filing, much of the rationale underlying these rules applies to the current situation. The Commission is persuaded that landowner notice is warranted in the present context, too.

But the benefits of public notice must be balanced with concerns for efficiency. In the current context, directing the applicants to mail notices long before any real opportunity to participate had been scheduled would only serve to frustrate people. Additionally, it would increase costs since the notice might need to be re-issued once public and evidentiary hearings had been scheduled. Neither the ratepayers' money nor the public's attention should be squandered.

The Commission concludes that the public notice due in this case should include mailed notice. The Commission will direct the applicants, when they apply for their certificate of need, to mail notice to all landowners, residents, and local and tribal governments in the corridor of potential routes indicated in their application, consistent with the requirements of proposed part 7848.1900, subpart 3. But in the interest of efficiency, the applicants need not mail these notices until the times, dates, and places of hearings for this application are known, so that this information may be included. This is consistent with the Commission's past practice.³

³See *In the Matter of the Application of a Certificate of Need for a High-Voltage Transmission Line by Great River Energy and Wright-Hennepin Cooperative Electric Association*, Docket No. ET-2/CN-02-536 ORDER FINDING APPLICATION COMPLETE AS OF DATE OF SUPPLEMENTAL FILING AND REQUIRING NOTICE (January 27, 2003) at 4-5.

In addition to information about hearings, the notice should include a map of the proposed transmission route and the other items listed in proposed part 7848.1900, subpart 4, revised as necessary to reflect that this is a certificate of need filing rather than a biennial transmission plan filing. The Commission will direct the applicants to work with the Commission's staff to develop appropriate notice language. The Commission's Executive Secretary will be authorized to approve the notices.

Also consistent with proposed part 7848.1900, subp. 3, the Commission will direct the applicants to publish notice of the public and evidentiary hearings in this case at least ten days in advance using display advertisements in newspapers of general circulation. The applicants should consult beforehand with Commission staff as to the timing, text, and distribution of these advertisements. Upon publication, the applicant should file proof of publication.

IV. The Applicants' Exemption Request

1. The Legal Standard

The requirements for a certificate of need application appear at Minnesota Rules part 7849.0200 *et seq.* Three rules are especially relevant to the current exemption request:

- Part 7849.0270, subpart 2.B., directs an applicant to forecast how much energy will be consumed within the applicant's system, disaggregated into nine customer categories (residential, commercial, industrial, etc.), as well as the number of customers in each category.
- Part 7849.0270, subpart 2.C., requires that this forecast identify how much electricity each customer category would consume at times of maximum system demand.
- Part 7849.0220, subpart 2, states that when a project is needed to meet the requirements of only a portion of a system, then the forecasting data required by part 7849.0270 should pertain only to that portion of the system.

Because the certificate of need rules apply to a broad range of projects, those rules explicitly permit applicants to request exemptions from filing requirements that are inappropriate in individual cases. The Commission is to grant exemptions when the data requirements at issue (1) are unnecessary to determine need in a specific case or (2) can be satisfied by submitting documents other than those required by the rule. Minn. Rules parts 7849.0200, subp. 6; 7855.0200, subp. 8.

2. The Exemption Request

The applicants plan to propose a transmission line project designed to maintain reliable electric service in parts of eastern Minnesota and western Wisconsin. Consequently the rules would require the application to include forecast data focused on the relevant portions of the applicants' systems.

The applicants claim that this data is not necessary for determining the need for the transmission line. The applicants propose to demonstrate the line's need by showing that the current system cannot operate reliably under certain scenarios, and that this problem would be ameliorated if the new transmission line were added.

Moreover, the applicants claim that they do not have the information listed in part 7849.0270, subp. 2.B and C, disaggregated to the relevant areas. They record and maintain a variety of data, but typically based on categories established by tariff or organizations such as the Mid-Continent Area Power Pool (MAPP) or the Rural Utilities Service (RUS).

As a substitute for the required data, the applicants propose to submit demand and forecast data disaggregated by substation rather than by consumer category. The applicants concede that they could generate some rough estimates of the consumer-category data, but argue that it would simply not be worth the effort.

While NSP denies that it has the required data disaggregated by consumer category, at hearing it acknowledged that it could provide the data on an aggregated, system-wide and service area-wide basis.

3. Comments

No commentor supports granting the exemption request as proposed. The CRVC, the Department, Lindstrom, Mr. Martin, the NAWO, Mr. Oberg and the Reinhardts recommend that the Commission deny the request outright. These parties argue, alternatively, that the data required by the rules is necessary for evaluating the need for the facilities, or that the need for this data cannot be ruled out at this time. The EQB staff is willing to recommend granting the request, but only if the applicants respond to a number of its concerns, discussed below.

At the outset, many commentors express scepticism about the applicants' claim that the proposed line has been designed for the purpose of serving a local need; rather, these commentors contend that the line has been designed, at least in part, to permit the applicants to sell power to other utilities. Lindstrom in particular argues that the Commission should require the applicants to provide both regional data and overall system data as part of their certificate of need filing on the theory that the proposed transmission line is intended in part to facilitate inter-regional power transfers.

Even if some of the data listed in the rules were not available, the EQB staff asks the applicants to provide whatever demand and energy consumption data they have disaggregated by consumer category and region. And both the Department and the EQB staff see value in the applicants' offer to provide demand data from each substation in the affected areas and annual forecasts of demand growth at each substation. The EQB staff further asks that the applicants provide all available data on energy consumption by substation in the affected areas.

The EQB staff request Commission clarification on a number of points. While the EQB does not oppose granting the exemption, it asks the Commission to clarify that doing so would not preclude any person from recommending, or the Commission from requiring, the submission of additional information before finding the application substantially complete. Additionally, the EQB staff seeks acknowledgment that eventual acceptance of an application as substantially complete, with or without additional information, does not preclude the development of additional information through discovery.

Additionally, the EQB staff and Lindstrom seek an explanation for the applicants' failure to collect data required by Commission rule.

4. Commission Action

The filing requirements from which the applicants seek exemption require information that the applicants claim not to possess. It would be unfair to deny the applicants an opportunity to prove need for the proposed transmission line on the basis of the information available to them. To allow this application to go forward, the Commission will grant the exemptions in part, as clarified below, on the grounds that the filing requirements at issue may be satisfied by submitting other documents. Minn. Rules parts 7849.0200, subp. 6; 7855.0200, subp. 8.⁴

In granting this exemption, it should be understood that no decision the Commission makes here will preclude any person from recommending, or the Commission from requiring, the submission of additional information before finding the application substantially complete. Eventual acceptance of an application as substantially complete, with or without additional information, would not preclude the development of additional information through discovery. And the burden of proving need for the proposed facility remains with the applicants. The exemptions granted relate to filing requirements only; they are not findings that the information at issue may not prove essential to finding need. Such substantive findings would require careful examination of the merits of the application.⁵

⁴*In the Matter of the Application by Koch Refining Company for Certification of the Pine Bend Cogeneration Project*, Docket No. IP-2/CN-95-1406 ORDER GRANTING EXEMPTIONS FROM FILING REQUIREMENTS (February 16, 1996).

⁵*Id.*; *In the Matter of the Application of Rapids Power LLC for a Certificate of Need for its Grand Rapids Cogeneration Project*, Docket No. IP-4/CN-01-1306 ORDER GRANTING EXEMPTIONS FROM FILING REQUIREMENTS, PERMITTING EXPEDITED FILING, AND EXTENDING PERIOD TO DETERMINE ADEQUACY OF FILING (October 9, 2001) at 3-4; *In the Matter of the Application of Great River Energy for a Certificate of Need for a High Voltage Transmission Line*, Docket No. ET-2/CN-02-536 ORDER GRANTING AND DENYING EXEMPTION REQUESTS AND CLARIFYING FILING REQUIREMENTS (July 2, 2002) at 7.

As a condition of granting the exemption, the Commission will direct the applicants to provide substitute data where practicable. Even if they cannot disaggregate the data by customer categories, the applicants can nevertheless file the data on an aggregated, system-wide and service area-wide basis. Additionally, the Commission will direct the applicants to file the information disaggregated by substation, to the best of their abilities. The applicants should provide whatever data already exists, including data compiled for MAPP and RUS. Where firm data is lacking, the Commission will direct the applicants to provide estimates wherever existing information provides a basis for doing so. Where there is no reasonable basis for making an estimate, the Commission will direct the applicants to explain why not.

Finally, the Commission will direct the applicants to explain why they have not maintained the information identified in Commission rules by consumer category.

The Commission will so order.

ORDER

1. The motion to require the applicants to mail to landowners notice of the request for exemption is denied.
2. The applicants shall provide direct mail notice of the times, dates, and places of hearings on their application for a certificate of need to build a large energy facility. The applicants shall use their best efforts to give this notice to landowners, residents, and local and tribal governments in the corridor of potential routes indicated in their application. This notice shall include a map of the proposed transmission route, and other content from the Commission's proposed rules on biennial transmission projects reports, part 7848.1900, subp. 4, revised as necessary to reflect that this is a certificate of need filing rather than a biennial transmission plan filing. The applicants shall work with the Commission's staff to develop appropriate notice language. The Executive Secretary is authorized to approve the notices.
3. The applicants shall publish notice of the public and evidentiary hearings in this case at least ten days in advance using display advertisements in newspapers of general circulation. The applicants shall consult beforehand with Commission staff as to the timing, text, and distribution of these advertisements and shall obtain proof of publication.
4. The applicants shall file information on demand and annual energy consumption for the applicants' service areas and systems as set out in part 7849.0270.
5. The applicants shall file information on demand and energy consumption data as set out in part 7849.0270 by load center and substation to the best of their abilities. The applicants shall include information that already exists, including data compiled for MAPP and RUS.

The applicants shall provide estimates when they can reasonably be made based on existing information. For any category for which an estimate cannot reasonably be made, the applicants shall explain why not.

6. The applicants shall file an explanation for their failure to maintain the information listed in Commission rules for each consumer category.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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